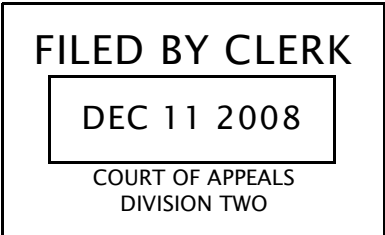


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0140-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
FIDELE BIRAHAGAZE BATEKREZE,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20021112

Honorable Patricia G. Escher, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Fidele Birahagaze Batekreze aka
Fidele Batekreze Birahagaze

Florence
In Propria Persona

PELANDER, Chief Judge.

¶1 In this petition for review, Fidele Birahagaze Batekreze challenges the trial court’s order dismissing his fourth petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. On review, Batekreze raises three issues, contending his guilty plea was invalid, the trial court improperly barred him from withdrawing his guilty plea, and he was denied effective assistance of counsel. We will not disturb the trial court’s ruling unless the court clearly abused its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no such abuse here.

¶2 Pursuant to a plea agreement, Batekreze was convicted of one count of sexual assault, a class two felony, in violation of A.R.S. § 13-1406. Batekreze was sentenced to 5.25 years in the Arizona Department of Corrections (ADOC). From February 2006 until April 2007, Batekreze filed four separate petitions for post-conviction relief. In his first petition, he asked the trial court to vacate the portion of its sentencing order requiring him to pay attorney fees. After the court did so, Batekreze filed a second petition in July 2006, requesting a “clarification of [his] sentence.” The court subsequently denied that petition.

¶3 Thereafter, Batekreze filed a third petition entitled “motion for order for (A.D.O.C.) to comply with sentencing order and for expedient release.” After an evidentiary hearing, the trial court offered Batekreze the opportunity to withdraw his guilty plea and face trial on the original charges, Batekreze chose not to do so and, instead, withdrew his request.

¶4 In his fourth petition, Batekreze moved to withdraw his guilty plea and to vacate the sentence. He argued that he did not sufficiently understand the English language

and that his attorney's failure to advise him of the possible deportation consequences of his guilty plea constituted ineffective assistance of counsel (IAC). The trial court summarily dismissed that petition.¹ This pro se petition for review followed.²

¶5 On review, Batekreze contends that his guilty plea was not “voluntarily, intelligently made” because of his limited proficiency in the English language.³ But Batekreze's failure to argue this previously precludes his raising it now. *See* Ariz. R. Crim. P. 32.2. Rule 32.2(a)(3) provides that a defendant is precluded from relief based on any ground “[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding.” Such a claim is precluded unless it falls under one of the exceptions listed in subsections (d), (e), (f), (g), or (h) of Rule 32.1. *See* Ariz. R. Crim. P. 32.2(b). Because this is Batekreze's

¹Although Batekreze filed another Rule 32 petition, apparently his fifth, in April 2008, and the trial court summarily dismissed that petition on May 30, that ruling is not before us as it came after Batekreze filed his petition for review in this matter.

²In its order dismissing Batekreze's fourth Rule 32 petition, the trial court noted that his sentence had expired in June 2007 and his period of community supervision had expired in March 2008. But, because the court also noted that Batekreze was still “being held in custody pending federal deportation proceedings,” and because he challenged below the validity of his conviction and sentence based on an allegedly invalid guilty plea, we do not find his claims moot.

³The claim Batekreze made below was somewhat different than his claim on review. In his petition below, Batekreze alleged “that he made a Guilty Plea to this charge without knowing the consequences . . . because [he] was not fully aware of the English language.” The trial court did not address that issue because it found Batekreze's “sole claim” was IAC. Even if this claim cannot be so characterized and even if Batekreze adequately presented and preserved the claim below, the trial court did not abuse its discretion because the claim was precluded.

fourth petition and his claim does not fall within any of those exceptions, it is precluded.⁴ *See State v. Swoopes*, 216 Ariz. 390, ¶ 23, 166 P.3d 945, 952-53 (App. 2007).

¶6 Next, the trial court did not abuse its discretion in finding Batekreze had waived the opportunity to withdraw his guilty plea. *See State v. Anderson*, 147 Ariz. 346, 351, 710 P.2d 456, 461 (1985) (trial court’s refusal to allow withdrawal of guilty plea reviewed for clear abuse of discretion); *see also* Ariz. R. Crim. P. 17.5. In the post-conviction context of Rule 32, unless the petitioner alleges and establishes that one of the exceptions in Rule 32.2(b) applies, any claim asserted in a successive petition that was raised or could have been raised in a prior proceeding “will be deemed waived and precluded.” *State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002). Batekreze had filed three previous Rule 32 petitions without having sought leave to withdraw his guilty plea. Nonetheless, in the evidentiary hearing on his third petition, the trial court ruled Batekreze “was entitled to relief but only in the form of being allowed to withdraw his plea and go to trial on the original charges.” Noting that Batekreze elected to withdraw his petition instead, the court dismissed that petition. Under these circumstances, and because Batekreze first presented this claim in his fourth Rule 32 petition, the trial court did not abuse its discretion in finding the claim waived.

⁴We also note that Batekreze’s fourth petition was untimely. Rule 32.4(a), Ariz. R. Crim. P., requires that a notice of post-conviction relief be filed within ninety days of the entry of judgment or within thirty days after the issuance of final order or mandate of the appellate court.

¶7 Finally, Batekreze contends that he was denied effective assistance of counsel. This claim, like the other two claims discussed above, Batekreze failed to assert in any of his previous Rule 32 petitions. Again, with certain exceptions that are not applicable here, claims not raised in a previous post-conviction relief proceeding are waived, including claims of IAC. *See* Ariz. R. Crim. P. 32.2; *see also Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d at 526; *Swoopes*, 216 Ariz. 390, ¶ 23, 166 P.3d at 952-53.

¶8 Even if the claim were not precluded, however, the trial court did not abuse its discretion in finding it to be without merit. To establish IAC, a defendant must prove (1) counsel's performance fell below prevailing professional norms and (2) the outcome of the case probably would have been different but for counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). If the defendant fails to make a sufficient showing of either element, the court need not determine whether the other was satisfied. *State v. Salazar*, 146 Ariz. 540, 543, 707 P.2d 944, 947 (1985). Batekreze claimed below that his attorney's failure to inform him of the deportation consequences of pleading guilty constituted IAC. Deportation consequences of a guilty plea, however, are collateral matters about which counsel has no duty to inform the defendant. *State v. Rosas*, 183 Ariz. 421, 423, 904 P.2d 1245, 1247 (App. 1995); *see also State v. Vera*, 159 Ariz. 237, 239, 766 P.2d 110, 112 (App. 1988) (trial court need not inform pleading defendant of deportation consequences). Accordingly, the court

did not abuse its discretion in ruling that Batekreze had failed to show any deficiency in trial counsel's performance.

¶9 The petition for review is granted, but for the reasons stated, relief is denied.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge